

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

STEPHEN WHITAKER
32 Main Street
Suite 1331
Montpelier, VT 05601

Plaintiff,

v.

DEPARTMENT OF STATE
2201 C Street, NW
Washington, DC 20520,

and

CENTRAL INTELLIGENCE AGENCY
Washington, DC 20505,

and

DEPARTMENT OF DEFENSE
1400 Defense Pentagon
Washington, DC 20301,

Defendants.

Civil Action No. 1:12-cv-_____

* * * * *

COMPLAINT

Plaintiff Stephen Whitaker brings this action against Defendants Central Intelligence Agency, Department of Defense, and Department of State pursuant to the Freedom of Information Act, 5 U.S.C. § 552, *et seq.*, as amended (“FOIA”), the Privacy Act, 5 U.S.C. § 552a, *et seq.* (collectively “FOIA/PA”), the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, and the All Writs Act, 28 U.S.C. § 1651.

JURISDICTION

1. This Court has both subject matter jurisdiction over this action and personal jurisdiction over Defendants pursuant to 5 U.S.C. §§ 552(a)(4)(B), 552a(g)(1)(D) and 28 U.S.C. § 1331.

VENUE

2. Venue is appropriate under 5 U.S.C. §§ 552(a)(4)(B), 552a(g)(5) and 28 U.S.C. § 1391.

PARTIES

3. Plaintiff Stephen Whitaker is a U.S. citizen and is a resident of the state of Vermont. He is the son and next-of-kin of Harold William Whitaker, who has been declared legally deceased.

4. Defendant Central Intelligence Agency (“CIA”) is an agency within the meaning of 5 U.S.C. § 552(e), and is in possession and/or control of the records requested by Plaintiff which are the subject of this action.

5. Defendant Department of Defense (“DOD”) is an agency within the meaning of 5 U.S.C. § 552(e), and is in possession and/or control of the records requested by Plaintiff which are the subject of this action.

6. The U.S. Army (“Army”) and U.S. Air Force (“USAF”) are DOD components.

7. Defendant Department of State (“State”) is an agency within the meaning of 5 U.S.C. § 552(e), and is in possession and/or control of the records requested by Plaintiff which are the subject of this action.

FIRST CAUSE OF ACTION

(STATE – RECORDS DENIAL – 200904872)

8. Plaintiff repeats and realleges the allegations contained in all paragraphs set forth above.

9. On 3 October 1980 a DC-3 airplane piloted by Harold William Whitaker and a co-pilot disappeared over Spain. In this action this event will hereinafter referred to as “the disappearance.”

10. On 3 January 2008 Plaintiff submitted to State a FOIA/PA request for certain records about the disappearance created between 1980-84. State acknowledged receipt of this request and assigned it Request No. 200800250.

11. On 31 July 2008 Plaintiff submitted to State a FOIA/PA request for all records about his father created between 1975-85. State initially combined this request with Request No. 200800250.

12. On 17 June 2009 State reconsidered its earlier determination to combine Plaintiff’s two requests and renumbered his 31 July 2008 request as Request No. 200904872.

13. On 14 April 2011 State closed Request No. 200904872, stating that the final search of the Office of Passport Services had yielded no responsive records.

14. On 13 May 2011 Plaintiff appealed the adequacy of State’s search.

15. As twenty working days have elapsed without a substantive determination by State, Plaintiff has exhausted all required administrative remedies.

16. Plaintiff has a legal right under FOIA/PA to obtain the information he seeks, and there is no legal basis for the denial by State of said right.

SECOND CAUSE OF ACTION

(STATE – CONSTRUCTIVE RECORDS DENIAL – 201103392)

17. Plaintiff repeats and realleges the allegations contained in all paragraphs set forth above.

18. On 29 April 2011 Plaintiff submitted to State a FOIA/PA request for all records pertaining to the administrative processing of FOIA/PA requests submitted by him since January 2008.

19. On 16 May 2011 State acknowledged receipt of this request and assigned it Request No. 201103392.

20. On 23 September 2011 State released several records which would be responsive to Request No. 201103392 to Michael Ravnitzky, an unrelated third party requester.

21. As twenty working days have elapsed without a substantive determination by State, Plaintiff has exhausted all required administrative remedies.

22. Plaintiff has a legal right under FOIA/PA to obtain the information he seeks, and there is no legal basis for the denial by State of said right.

THIRD CAUSE OF ACTION

(STATE – CONSTRUCTIVE RECORDS DENIAL – UNKNOWN NO. 1)

23. Plaintiff repeats and realleges the allegations contained in all paragraphs set forth above.

24. During its processing of Request No. 200904872, State identified several records and subsequently classified them as “non-responsive” or “irrelevant.”

25. On 20 January 2012 Plaintiff submitted to State a FOIA/PA request for all records which were classified as “non-responsive” or “irrelevant” in the processing of Request No. 200904872.

26. State has not provided Plaintiff with an acknowledgement of this request.

27. As twenty working days have elapsed without a substantive determination by State, Plaintiff has exhausted all required administrative remedies.

28. Plaintiff has a legal right under FOIA/PA to obtain the information he seeks, and there is no legal basis for the denial by State of said right.

FOURTH CAUSE OF ACTION

(CIA – RECORDS DENIAL – F-2010-00611)

29. Plaintiff repeats and realleges the allegations contained in all paragraphs set forth above.

30. On 15 February 2010 Plaintiff submitted to CIA a FOIA/PA request for records about four aircraft (including the DC-3 which disappeared) and five individuals (including Harold William Whitaker and his co-pilot).

31. On 24 February 2010 CIA acknowledged receipt of this request and assigned it Request No. F-2010-00611. In this letter CIA refused to confirm or deny the existence or nonexistence of responsive records.

32. On 8 April 2010 Plaintiff appealed CIA’s denial.

33. As twenty working days have elapsed without a substantive determination by CIA, Plaintiff has exhausted all required administrative remedies.

34. Plaintiff has a legal right under FOIA/PA to obtain the information he seeks, and there is no legal basis for the denial by CIA of said right.

FIFTH CAUSE OF ACTION

(CIA – RECORDS DENIAL – P-2011-00460)

35. Plaintiff repeats and realleges the allegations contained in all paragraphs set forth above.

36. On 24 March 2011 Plaintiff submitted a FOIA/PA request to CIA for all records about Harold William Whitaker and himself.

37. On 8 April 2011 CIA acknowledged receipt of this request. CIA's letter stated: The office of the Information and Privacy Coordinator received your 24 March 2011 letter requesting information pertaining to you. You also requested information on your father Harold William Whitaker. That part of your request falls under the purview of the FOIA and will be addressed via separate correspondence. Since your request for information on you falls under the purview of the Privacy Act, it has been assigned [Request No. P-2011-00460] for identification purposes and will be addressed via this letter.

38. This letter stated that CIA could not locate any responsive records which pertained to an open CIA affiliation and that it refused to confirm or deny the existence or nonexistence of records which would reveal a classified connection to CIA.

39. On 12 May 2011 Plaintiff appealed CIA's denial and the adequacy of its search.

40. As twenty working days have elapsed without a substantive determination by CIA, Plaintiff has exhausted all required administrative remedies.

41. Plaintiff has a legal right under FOIA/PA to obtain the information he seeks, and there is no legal basis for the denial by CIA of said right.

SIXTH CAUSE OF ACTION

(CIA – CONSTRUCTIVE RECORDS DENIAL – UNKNOWN NO. 2)

42. Plaintiff repeats and realleges the allegations contained in all paragraphs set forth above.

43. On 9 June 2011 Plaintiff wrote CIA requesting a request number for the portion of his 24 March 2011 request pertaining to Harold William Whitaker. He further challenged CIA's decision to process this request under FOIA instead of the Privacy Act, as Harold William Whitaker is deceased and he is his son and next-of-kin.

44. CIA has not responded to this letter, nor has it provided Plaintiff with a request number for the portion of his request pertaining to Harold William Whitaker.

45. As twenty working days have elapsed without a substantive determination by CIA, Plaintiff has exhausted all required administrative remedies.

46. Plaintiff has a legal right under FOIA/PA to obtain the information he seeks, and there is no legal basis for the denial by CIA of said right. Moreover, Plaintiff has a legal right to processing under both FOIA and the Privacy Act of his request for records about his deceased father, and there is no legal basis for the denial by CIA of said right.

SEVENTH CAUSE OF ACTION

(ARMY – CONSTRUCTIVE RECORDS DENIAL – 11-0959, FA11-2593, FA11-3079)

47. Plaintiff repeats and realleges the allegations contained in all paragraphs set forth above.

48. Because Harold William Whitaker's co-pilot was a Major in the U.S. Army, the Army conducted an investigation into the disappearance.

49. On 2 May 2011 Plaintiff submitted to the Army a FOIA/PA request for all records about Harold William Whitaker and all records about the Army investigation into the disappearance.

50. On 19 May 2011 the Army acknowledged receipt of this request and assigned it Request No. 11-0959. This letter indicated that the request was being referred to the Army Human Resources Command and the Army Crime Records Center.

51. On 15 June 2011 the Army Crime Records Center acknowledged receipt of this referred request and assigned it Request No. FA11-2593. This letter stated that no responsive records could be located.

52. On 25 June 2011 Plaintiff requested confirmation that the Army Crime Records Center had searched for the co-pilot's name, since that would be the name attached to the investigation. Plaintiff also asked if the Army Crime Records Center was the correct Army component to process this request, since it was not a criminal investigation.

53. On 12 July 2011 the Army Crime Records Center responded to this message, assigning it the new Request No. FY11-3079. This letter stated that no responsive records had been located but did not confirm that a search was conducted for the co-pilot's name or that the Army Crime Records Center was the Army component most likely to have responsive records.

54. On 15 August 2011 Plaintiff appealed the adequacy of the Army's search.

55. As twenty working days have elapsed without a substantive determination by the Army, Plaintiff has exhausted all required administrative remedies.

56. Plaintiff has a legal right under FOIA/PA to obtain the information he seeks, and there is no legal basis for the denial by the Army of said right.

EIGHTH CAUSE OF ACTION

(USAF – RECORDS DENIAL – 2011-06326-F)

57. Plaintiff repeats and realleges the allegations contained in all paragraphs set forth above.

58. On 12 November 2009 Plaintiff submitted to USAF a FOIA request for certain records about the disappearance.

59. On 19 November 2009 the Ramstein USAF Base (“Ramstein”) acknowledged receipt of this request and assigned it Request No. 2010-01041-F.

60. On 17 November 2010 Ramstein closed this request, informing Plaintiff that it had located no responsive records. Plaintiff did not appeal the adequacy of Ramstein’s search.

61. On 14 August 2011 Plaintiff resubmitted Request No. 2010-01041-F to USAF via the eFOIA electronic system.

62. On 15 August 2011 Ramstein acknowledged receipt of this resubmitted request and assigned it Request No. 2011-06326-F.

63. On 16 August 2011 Ramstein refused to process this request, claiming that it was not required to process duplicate requests. Ramstein stated that the fact that Plaintiff had not submitted a timely administrative appeal of the adequacy of its search in 2010 precluded Plaintiff from ever filing a request for those records again.

64. On 19 August 2011 Plaintiff appealed Ramstein’s denial via the eFOIA electronic system, stating: “Almost a year has passed since your previous search and your previous determination. Furthermore, there is no support in FOIA for a rule that someone who fails to exhaust administrative remedies by missing a deadline cannot do so by resubmitting the request and then filing a timely appeal.”

65. On 19 August 2011 Ramstein acknowledged receipt of this appeal and assigned it Appeal No. 2011-00217-A.

66. On 29 August 2011 Ramstein denied Plaintiff's appeal.

67. Plaintiff has a legal right under FOIA/PA to obtain the information he seeks, and there is no legal basis for the denial by USAF of said right.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Stephen Whitaker prays that this Court:

(1) Order the Central Intelligence Agency, Department of Defense, and Department of State to provide all responsive records to him as soon as practicable;

(2) Order preliminary and permanent injunctive and/or declaratory relief as may be appropriate;

(3) Award reasonable costs and attorneys' fees as provided in 5 U.S.C. § 552(a)(4)(E), 552a(g)(2)(A), 28 U.S.C. § 2412(d), or any other applicable law;

(4) Expedite this action in every way pursuant to 28 U.S.C. § 1657(a); and

(5) Grant such other relief as the Court may deem just and proper.

Date: February 27, 2012

Respectfully submitted,

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